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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 422

SERVICE TRUCKING COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court sustaining a decision of the Interstate Commerce Commission that appellant's op-

erations between points in Maryland over a route through Delaware were not authorized by its interstate certificate (J.S. 15a-16a).

The pertinent facts, which are not in dispute, are as follows: Appellant, a common carrier by motor vehicle, routed certain shipments between Baltimore and points in eastern Maryland through Delaware.[1] Competing carriers instituted a complaint proceeding before the Public Service Commission of Maryland ("P.S.C.") charging appellant with engaging in intrastate transportation without appropriate authority from the State of Maryland, and with using its interstate certificate as a subterfuge to evade the laws of Maryland. Appellant then sought from the Interstate Commerce Commission a declaratory order that its certificate authorizes such operations.

The Commission found (1) that appellant's route through Delaware is approximately 12 miles longer and is less convenient than the route within Maryland (J.S. 12a); (2) that appellant utilizes the direct all-Maryland route for nonregulated Maryland intrastate traffic and for interstate shipments between points in Maryland, and utilizes the route through Delaware only for those shipments between points in Maryland for which it lacks appropriate intrastate authority from the P.S.C. (*ibid.*); and (3) that appellant maintains no terminal in Delaware, and that the record did not support appellant's contention that

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[1] Appellant's certificate authorizes transportation in interstate commerce between points in Maryland, Delaware, and Virginia and points in Virginia, the District of Columbia, and Maryland (J.S. 9-10).

it routes the traffic through Delaware for reasons of economy and efficiency (J.S. 13a).

The Commission held that appellant "is attempting in bad faith to convert to interstate movements traffic which, but for its routing, is actually in intrastate commerce subject to the laws of Maryland" (J.S. 13a), and admonished appellant to discontinue such operations (J.S. 14a). On appeal, the three-judge court affirmed the Commission's order, holding that "no logical basis for [appellant's] circuity [of routes], except that of subterfuge, has been shown" (J.S. 6a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

The principles governing the Commission's power to prohibit motor carriers from utilizing interstate certificates to evade state regulation of their purely intrastate operations are well established. This Court made it clear in *Service Storage and Transfer Co., Inc.* v. *Virginia*, 359 U.S. 171, that the Commission's authority to interpret its own interstate certificates includes the power to prohibit particular operations that are being conducted as "a subterfuge to escape" state regulation (p. 179). Where the evidence reveals that a carrier's operation between points in the same State over interstate routes is not a "logical and normal operation" (*Service Transfer Co., supra* at 178), the Commission is warranted in concluding that such operation is a subterfuge to avoid State law and an abuse of the carrier's interstate certificate.

Hudson Transportation Co. v. *United States*, 219 F. Supp. 43 (D. N.J.), affirmed *sub nom. Arrow Carrier Corp.* v. *United States*, 375 U.S. 452; *Jones Motor Co., Inc.* v. *United States*, 218 F. Supp. 133 (E.D. Pa.), affirmed *sub nom. Highway Express Lines* v. *Jones Motor Co., Inc.*, 377 U.S. 217. Appellant's argument that the Commission has "modified" the literal terms of its interstate certificate is beside the point. The Commission's established authority to prevent the use of its certificates as a subterfuge to evade state regulation of essentially intrastate operations empowers the Commission to look beyond the literal language of such certificates.

In the present case, the district court upheld, as supported by substantial evidence, the Commission's finding that appellant's circuitous operations through Delaware were conducted "in bad faith and a subterfuge" (J.S. 4a) to evade the laws of Maryland. There is no occasion for further plenary review of this factual determination (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491)—a determination which supports the Commission's conclusion that appellant's certificate does not authorize the challenged operations.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 1965.

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellees, Kent Freight Lines, Inc., Preston Trucking Company, Inc. and Victor Lynn Lines, Inc., pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment and decree, entered on April 22, 1965, and from Order denying appellant's motion for rehearing entered on April 30, 1965, by a specially constituted district court of three

judges, dismissing appellant's complaint seeking to set aside a Decision and Order of the Interstate Commerce Commission.

The above named corporations are common carriers by motor vehicle and transport property in interstate and foreign commerce by virtue of certificates of public convenience and necessity issued to each of them by the Interstate Commerce Commission. They also transport property in intrastate commerce in Maryland by virtue of permits issued to each of them by the Public Service Commission of Maryland. Appellant, Service Trucking Company, Inc. does not hold a permit to transport property in intrastate commerce within the State of Maryland. It does hold a certificate of public convenience and necessity issued by the Interstate Commerce Commission which in pertinent part, authorizes the transportation in interstate and foreign commerce of general commodities, with the usual exceptions, from points and places in Maryland on and east of U.S. Highway 15 to points and places in Delaware, Maryland and Virginia, east of the Chesapeake and Delaware Canal (J.S. 10).

On September 14, 1961, appellee motor carriers, commenced a proceeding before the Public Service Commission complaining that Appellant was transporting freight locally between Baltimore, Md. and the Eastern Shore of Maryland without a permit from the Public Service Commission of Maryland, and was conducting such operations between its Baltimore and Federalsburg, Md. terminals by causing its line-haul vehicles to go by way of Bridgeville, Del. as a subterfuge and for the sole purpose of evading the jurisdiction of the Public Service Commission of Maryland, and that such operations were not, "bona fide" interstate commerce. This complaint proceeding is still pending. On October 17, 1961, Appellant filed a petition with the

Interstate Commerce Commission under Section 5(d) of the Administrative Procedure Act for an Order, declaring:

a). That Petitioner's certificate authorizes interstate operations between Baltimore and points on the Eastern Shore of Maryland providing such operations are conducted through a sister state;

b). The good faith of Petitioner's operations between Baltimore and points on the Eastern Shore of Maryland so long as they are conducted through a sister state, may not be challenged in a state forum for the issue of good faith has been conclusively determined by the Interstate Commerce Commission in its issuance of the certificate.

Among other findings, the Commission found (J.S. 13a-14a):

> "No logical reason appears on this record for the present routing of the otherwise intrastate freight other than the fact that petitioner is without intrastate authority to transport it. Petitioner's claim that the considered operations are routed through Bridgeville for reasons of economy and efficiency is without support in the record. This becomes obvious when it is considered that the Bridgeville route is patently circuitous, that petitioner maintains its terminal and break-bulk point at Federalsburg rather than at Bridgeville, and that only those movements which embrace shipments between Maryland points without a prior or subsequent interstate movement are in fact routed through Delaware. All things considered, we conclude that petitioner by engaging in the considered transportation is attempting in bad faith to convert to interstate movement of traffic which, but for its routing, is actually in intrastate commerce subject to the laws of Maryland."
>
> * * * * * *
>
> "We find that the considered operations by petitioner between points in Maryland through Delaware in the transportation of shipments having both origin and

> destination within Maryland are conducted as a subterfuge for the purpose of evading the laws of Maryland, and are not authorized by petitioner's certificate issued by this Commission. Petitioner is admonished to discontinue such operations. The petition will be denied."

In addition to the finding of the Commission, quoted by Appellant under the caption "(d) The Questioned Operations" (J.S. 13-14), the Commission also found:

> ". . . Petitioner asserts that it traverses the circuitous route through Delaware solely for the purpose of complying with its interstate certificate, but admittedly, it utilized the direct all-Maryland routes for non-regulated Maryland intrastate traffic and for shipments to points in Maryland already in the stream of interstate commerce. . . ." (J.S. 12a-J.S. 4a.)

On appeal, the three judge court affirmed the Commission, stating:

> "The findings of the Commission are not controverted, nor is there any claim that they are not supported by substantial evidence. . . ." (J.S. 3a.)
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> * * * * * *
>
> "As we have stated, Service makes no claim that the findings of fact made by the Commission are not supported by substantial evidence, and Service can make no claim that the Commission lacked jurisdiction to interpret the certificates of public convenience and necessity which it had heretofore issued. *Service Storage & Transfer Co., Inc. v. Virginia*, 359 U.S. 171 (1959). From the findings of fact, the conclusion is inescapable that Service's only purpose in routing less-than-truckload shipments via Bridgeville, Delaware is to attempt to make legal, by converting into interstate shipments, shipments in intrastate commerce for which Service lacks authority from the Public Service Commission of Maryland. That such a purpose is in bad faith and a subterfuge warranting an order to cease and desist

has been decided in *Hudson Transportation Company v. United States*, 219 F.S. (D.N.J. 1963), aff'd. sub nom. *Arrow Carrier Corporation v. United States*, 375 U.S. 452 (1964). See also *Jones Motor Co. v. United States*, 218 F.S. 133 (E.D. Pa. 1963), rehearing den. 223 F.S. 835 (E.D. Pa. 1963), aff'd. sub nom. *Highway Express Lines v. Jones Motor Co., Inc.*, 377 U.S. 217 (1964). (J.S. 4a-6a.)

ARGUMENT

THIS APPEAL INVOLVES NO SUBSTANTIAL QUESTION WARRANTING PLENARY CONSIDERATION BY THIS COURT.

1. As approved by this Court in *Service Storage & Transfer Co., Inc. v. Virginia*, 359 U.S. 171 (1959), Appellant invoked the jurisdiction and responsibility of the Interstate Commerce Commission to interpret its certificate and sought to have affirmed (as a defense to the complaint proceedings before the Public Service Commission of Maryland) in the declaratory proceedings before the Interstate Commerce Commission one or both of two propositions framed by the Appellant. Appellant at J.S. 18 refers to statement of Intervening Defendants on brief before the court below and quotes only part of the statement out of context in support of its argument that the certificate literally construed authorizes the questioned operations. Intervening Defendants did not concede that the questioned operations are authorized by the *proper* interpretation of the literal terms of the certificate. On Brief below (page 12) the Appellant contended:

> "Despite Plaintiff's request for a finding with respect to the literal interpretation of its certificate, neither the Examiner nor the Commission itself made any specific finding on that issue. Since the Certificate language is clear and unambiguous and is susceptible of but one interpretation and that interpretation involves a pure question of law, the Court is requested

> to find, since the Commission refused to do so, that the portion of the certificate involved authorizes interstate operations between Eastern Shore points in Maryland and the Baltimore area. *Intervening defendants here concede in the proceeding that literal interpretation of the certificate 'does authorize interstate operations between Baltimore and points on the Eastern Shore of Maryland. . . .' in their reply to plaintiff's petition to the Commission* but they sought by implication to add restrictive terms to Plaintiff's authority." (Emphasis supplied.)

To the foregoing Intervening Defendants replied (only portion of which is quoted by Appellant at J.S. 18) in pertinent part:

> "*If this is all that Plaintiff sought, it comes as something of a surprise for* we now and at all times wholeheartedly agree this Certificate literally authorizes interstate operations between Eastern Shore points in Maryland and the Baltimore area. *However, this is not the finding sought by the Plaintiff in its Petition for Declaratory Order from the Interstate Commerce Commission.* Rather it sought a Declaratory Order from the Interstate Commerce Commission declaring:
>
> a) That Petitioner's certificate authorizes interstate operations between Baltimore and points on the Eastern Shore of Maryland providing such operations are conducted through a sister state;
>
> b) The good faith of Petitioner's operations between Baltimore and points on the Eastern Shore of Maryland so long as they are conducted through a sister state, may not be challenged in a state forum for the issue of good faith has been conclusively determined by the Interstate Commerce Commission in its issuance of the certificate." (Emphasis supplied.)

The Interstate Commerce Commission may only issue certificates authorizing "bona fide" *interstate* transporta-

tion. Any interpretation of such certificate can only relate to the "bona fide" *interstate* transportation so authorized. To say that the certificate on its face authorizes the carrier to transport property in interstate and foreign commerce between the Eastern Shore points in Maryland and the Baltimore area is not to agree that it may lawfully do so provided the vehicles move in and out of the State of Delaware — 12 miles in and 12 miles back, as in this specific case. The bona fide operation in interstate commerce is the same today as it was when the Certificate was issued, no more and no less. "In" and "out" of Delaware in the manner of the questioned operations for the sole purpose of converting intrastate commerce into a species of interstate commerce in order to evade the jurisdiction of the State of Maryland is clearly not the "bona fide" interstate commerce authorized by the Certificate. Such operations are properly characterized as "mala fide" interstate commerce.

2. The decision of this Court in *Service Storage & Transfer Co., Inc. v. Virginia*, supra, clearly establishes that the competence of the Interstate Commerce Commission to interpret certificates which it had issued extends to matters such as here involved — the use of interstate operating authority as a device to evade lawful State regulation through the device of routing normally intrastate traffic across a State boundary and return. The governing principles regarding the Commission's power and authority in cases of this kind were also subsequently approved in *Hudson Transportation Company v. United States*, 219 F. Supp. 43 (D.N.J. 1963) *aff'd. mem sub nom. Arrow Carrier Corporation v. United States*, 375 U.S. 452 (1964); and *Jones Motor Co., Inc. v. United States*, 218 F. Supp. 133 (E.D. Pa. 1963), *aff'd. on rehearing*, 223 F. Supp. 835, *aff'd. mem sub nom. Highway Express Lines v. Jones Motor Co., Inc.*, 377 U.S. 217 (1964).

In *Service Storage & Transfer Co. v. Virginia,* supra, and which was considered by the Interstate Commerce Commission in *Service Storage & Transfer Co., Inc., Declaratory Order,* 71 M.C.C. 304, there was evidence of circuity in the transportation of less than truckload shipments between points in Virginia via the carrier's terminal at Bluefield West Va., but the operation through the consolidation terminal at Bluefield was natural and logical and actually more efficient than direct operation. Thus in the words of the Commission cited in footnote by this Court in *Service Storage & Transfer Co., Inc.,* supra, 178:

> "In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion that petitioner's operations, in the manner described constitute bona fide transportation in interstate commerce. We find that the operations described between points in Virginia through Bluefield, W. Va., are bona fide operations in interstate commerce within the authority granted to petitioner in Certificate No. MC 3047; Service Storage & Transfer Co., Inc., — Petition for Declaratory Order, 71 M.C.C. 304, 306."

In *Hudson Transportation Co. v. United States,* supra, there was no logical reason for the carrier to route its traffic circuitously through another State except that the carrier lacked authority from the State of Pennsylvania to conduct a more direct operation — thus a mere subterfuge and device calculated to escape the proper jurisdiction of the Commonwealth of Pennsylvania. The two carriers, Hudson Transportation Co. and Arrow Carrier Corporation, if they had held appropriate intrastate authority, admittedly would not have operated as they did via New Jersey in order to serve between Pennsylvania points. In the instant case, if Appellant held the required operating au-

thority from the State of Maryland the traffic between the Maryland points would not have moved circuitously via Bridgeville, Del. but entirely over Maryland highways. In attempting justification of the circuitous operation between terminals in Maryland via Bridgeville, the Commission found:

> ". . . Petitioner asserts that it traverses the circuitous route through Delaware solely for the purpose of complying with its interstate certificate, but admittedly, it utilized the direct all-Maryland routes for non-regulated Maryland intrastate traffic and for shipments to points in Maryland already in the stream of interstate commerce. . . ." (J.S. 4a.)

In the instant case, the court below has upheld the conclusion of the Commission that Appellant's circuitous operations via Delaware were conducted "in bad faith and a subterfuge" (J.S. 4a). There is no good reason or occasion for further review of this determination.

3. Contrary to Appellant's contentions there is no irreconcilable conflict between the *Hudson-Arrow* and *Jones Motor* cases. There is no conflict as to the Commission's jurisdiction and the extent of its power. The three cases are consistent with *Service Storage & Transfer Co.* The lower court in the instant case properly noted that the differences in the *Hudson-Arrow* and *Jones Motor Co.* cases are purely factual.

4. There is no merit to Appellant's contention that the Commission has unlawfully modified or revoked its certificate. The Commission's order simply requires the Appellant to limit its operations under the certificate which it issued to bona fide interstate transportation. Such a direction is "simply a definitive declaration of what rights existed from the very beginning" under the certificate, and, "cannot be equated with modification." *Nelson, Inc. v. United States,* 355 U.S. 554, 599, *reh. denied* 356 U.S. 934.

CONCLUSION

This appeal involves no substantial question warranting plenary consideration by this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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